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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VAUGHN DESHA
Sergeant, U.S. Marine Corps,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

DAVID C. LARSON
Captain, Judge Advocate General's Corps, United States Navy
Director, Appellate Defense Division, Navy-Marine Corps Appellate Review Activity
Washington Navy Yard
Washington, D.C. 20374
(202) 433-3600
Counsel of Record for Petitioner

TIMOTHY D. PERSONS
Lieutenant, Judge Advocate General's Corps, United States Naval Reserve
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
Washington Navy Yard
Washington, D.C. 20374
(202) 433-3600

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

Question Presented

I. DOES THE OFFENSE OF ARSON LIE WHERE THE PERPETRATOR IS THE OWNER AND SOLE OCCUPANT OF THE DWELLING?

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VAUGHN DESHA
Sergeant, United States Marine Corps,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner, Vaughn Desha, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding on January 13, 1987.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 23 M.J. 66 (C.M.A. 1986) (App. 2a) and 23 M.J. ___(C.M.A. 1987) (order denying petition for reconsideration) (App. 1a). The opinion of the Navy-Marine Corps Court of Military Review is unpublished. *United States v. Desha,* No. 83 4044 (N.M.C.M.R. October 31, 1983) (App. 12a).

JURISDICTION

The judgment of the Court of Military Appeals was entered on January 13, 1987 affirming its decision of November 10, 1986 and denying a petition for reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

Statutes Involved

10 U.S.C. § 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

. . .

10 U.S.C. § 926. Art. 126. Arson

(a) Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

. . .

Statement of the Case

Petitioner owned and lived in a mobile home located on Marine Corps Base, Camp Lejeune, North Caro-

lina. He was the sole occupant, as his wife and children had moved to another state a month earlier.

At 8:30 p.m. on March 8, 1983, petitioner poured gasoline on the floor of the mobile home. At 2 a.m., March 9, he set fire to it by tossing a roll of burning paper on the gasoline while he fled the home.

Neighbors from other mobile homes (some as close as 25 to 30 feet) reported the fire. The fire department responded, and extinguished the fire. Petitioner's mobile home suffered internal damage; but, the fire did not spread to neighboring mobile homes.

Petitioner was charged with and pleaded guilty at court-martial to a violation of Article 126(a), Uniform Code of Military Justice, 10 U.S.C. § 926(a), aggravated arson by setting fire to an inhabited building. Article 126(a) proscribes arson of an "inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being."

At his court-martial, petitioner stated that he intentionally set fire to his own residence because, out of frustration at his deteriorated marriage, he wanted to "[g]et rid of it." He admitted that he was still living there up to the time he set it on fire. Petitioner was convicted in accordance with pleas and was sentenced to imprisonment for five years.

On appeal below, petitioner maintained that, despite his pleas, he committed no offense for the following two reasons. First, in enacting Article 126(a), Congress did not intend to deviate from the common law requirement that a dwelling belong to "another" to be the object of arson. Therefore, because he burned

his own dwelling, petitioner did not commit arson. Second, at the time of the offense, petitioner's mobile home was not an "inhabited dwelling," and therefore did not fall within the ambit of the statute.

The Court of Military Appeals rejected both grounds and petitioner now seeks relief on the second of these two grounds.

Reasons For Granting The Writ

The question presented involves the construction of an article of the Uniform Code of Military Justice. The Court of Military Appeals construed the pertinent terms to apply to the facts in petitioner's case. As a result, petitioner suffered a criminal conviction for an act that does not violate the article and, for that matter, is not a crime at all.

Article 126(a) prohibits setting fire to two classes of structures: a specific class, "inhabited dwelling[s]" and a qualified residual class, "other structure[s]" with humans therein at the time of the offense. Although charged with arson of an inhabited "building," petitioner's conviction clearly rests on setting fire to the first, or "dwelling," class of structures. It was his residence and no other persons were present.

It is the meaning of the term "inhabited" before "dwelling" as well as the means by which that status is determined that is the subject of this petition. "It is an elemental rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." *United States v. Menasche*, 348 U.S. 528 (1955); 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (3rd ed. rev. 1973). Because "dwelling" already describes a place of habitation,

then the term "inhabited dwelling" can only mean a dwelling that is actively *used* as a place of habitation *at the time of the offense.* Only this interpretation gives meaning to the term "inhabited." Indeed, the Court of Military Appeals said as much in an earlier case. *United States v. Duke,* 16 U.S.C.M.A. 460, 464, 37 C.M.R. 80, 84 (1969). Therefore, if the dwelling petitioner set afire was not actively used as such at the time of ignition, then he committed no offense under Article 126(a).

Petitioner poured gasoline throughout his trailer at 8:30 p.m. He set fire to it $5^1/_2$ hours later. From these facts, there can be no doubt that, by the *time of ignition* if not before, his mobile home had lost its character as an "inhabited dwelling." The Court of Military Appeals found that it had not because of the absence of clear outward manifestations of abandonment *prior* to the time of ignition. The court did acknowledge the relevance of petitioner's intent (that his trailer cease to function as a place of habitation) to the question of its character but gave no weight to it. The court relied entirely on the absence of indications of abandonment to the general public. (App. 11a).

The presence or absence of those indications is simply not relevant. They would be relevant in a contested arson case where, for example, a *non-occupant* perpetrator raises abandonment by the owner as a defense. *See e.g., P.P.M. v. State,* 447 So. 2d 445 (Fla. App. 1984); *People v. Foster,* 103 Mich. App. 311, 302 N.W.2d 802 (1981).

In a case like this, where the perpetrator is the owner and *sole* occupant, his intent and, more importantly, the actions he took to manifest that intent

are the sole determinants of the character of the property.[1] The situation would be different were there others—family members, guests, or boarders—residing in the trailer at the time. In that case, it would still be an "inhabited dwelling," notwithstanding the owner's intent and acts.

The lower court's requirement of clear signs to the public of abandonment would lead to unjust and clearly absurd results. For example, one could burn down his own isolated mountain cabin (in which he alone lived) simply to clear the land for another purpose. Absent external signs of abandonment prior to setting it on fire, by the lower court's analysis this person would be guilty of arson. Congress could not have intended such an irrational result. It is well established that the law favors rational and sensible construction, 2A SUTHERLAND, *supra*, § 45.12, and avoids absurd results. *Commissioner of Internal Revenue v. Brown*, 380 U.S. 503 (1965). Construing the term "inhabited dwelling" to exclude dwellings in which the owner-perpetrator is the sole occupant would be consistent with this fundamental rule.

It would also be consistent with another basic rule of construction: that statutes be interpreted so as to effectuate their manifested purpose. *United States v. Lewis*, 235 U.S. 282 (1914). The purpose of any arson statute is self-evident: the protection of innocent human life inside flammable structures. Arson is a

[1] Petitioner did concede that he had not abandoned his trailer. This is a legal conclusion that simply has no basis in fact. When a sole occupant burns his home he necessarily abandons it. Petitioner's "concession," although apparently meaningful to the court below, cannot transform what is factually an innocent act into a crime.

deadly crime that threatens persons where they are most vulnerable, trapped within dwellings and other buildings. Specifically, danger to human life was noted as the essence of this statute by the Code drafting committee. *Uniform Code of Military Justice: Hearings on H.R. 2498 before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 1233 (1949).

Here, it is precisely that danger that is missing. Petitioner, as the sole occupant of his own detached trailer and present at the time, knew with certainty that no one else was present. There was no direct risk to human life. Truly, at the time of ignition, petitioner's trailer was an empty shell, no different in this sense than his automobile or any other piece of personal property. His act of burning his trailer is little more than a public nuisance—possibly criminal in nature—but not arson.

Petitioner has no quarrel with the lower court's conclusion that his mobile home was a "dwelling." A dwelling is a place of habitation. BLACK'S LAW DICTIONARY 454 (5th ed. 1979). Petitioner's mobile home was clearly that. Nor does petitioner quarrel with the court's conclusion that Article 126(a), like the common law, does not require the actual presence of a person in a home at the time of the offense as a necessary element of arson. *Duke*, 37 C.M.R. at 82; R. PERKINS, CRIMINAL LAW (2d ed. 1969).

The principal holding of the decision below is that, by leaving out the words "of another" after "dwelling" in Article 126(a), Congress intended to depart from the common law with respect to that element and to include the perpetrator's own dwelling within the ambit of arson under the Uniform Code of Mil-

itary Justice. Although he asserted otherwise on appeal below, petitioner no longer challenges this analysis of legislative intent. Petitioner also recognizes that this expansion of common law arson is typical of modern day arson statutes. PERKINS, *supra,* at 227. However, when this holding is combined with the court's application of the term "inhabited dwelling" to the situation where the owner-perpetrator is also the sole occupant, then the crime of arson has been expanded beyond reason.[2]

Petitioner pleaded guilty to arson, admitting each element of the offense. Normally, a guilty plea waives appellate review of all defenses. However, because petitioner's plea was not providently made it should not bar this Court's review. Article 45, Uniform Code of Military Justice, 10 U.S.C. § 845 prohibits the acceptance and entry of a plea of guilty if the accused sets up matters inconsistent with his plea or otherwise pleads improvidently. *See also, McCarthy v. United States,* 394 U.S. 459 (1969); *United States v. Davenport,* 9 M.J. 364 (C.M.A. 1980); *United States v. Care,* 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

The facts petitioner admitted do establish an improvident plea. He stated that he had lived in the trailer until he set fire to it; that he was the sole owner-occupant of his trailer; that no one else was present; and that he set fire to it for the purpose of destroying it. For the reasons advanced above, these

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[2] Petitioner could accept this expansion had his dwelling been an apartment in a building or otherwise connected to other dwellings. Then, the danger to occupants of those dwellings would be present and the underlying objective of the arson statute would be served.

facts remove the trailer from the class, "inhabited dwelling," at the time of ignition. For that reason, petitioner's plea was improvident, was not knowingly made, and now presents no bar to review.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID C. LARSON
Captain, Judge Advocate
General's Corps, United
States Navy
Director, Appellate Defense Division,
Navy-Marine Corps Appellate
Review Activity
Washington Navy Yard
Washington, D.C. 20374
(202) 433-3600
Counsel for Petitioner

TIMOTHY D. PERSONS
Lieutenant, Judge Advocate
General's Corps, United
States Naval Reserve
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
Washington Navy Yard
Washington, D.C. 20374
(202) 433-3600

APPENDIX

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 48255/MC
CMR Dkt. No. 83-4044

UNITED STATES,

Appellee,

v.

VAUGHN DESHA (499-62-9302),

Appellant.

ORDER DENYING PETITION FOR RECONSIDERATION

On consideration of the appellant's petition for reconsideration of the Court's decision, 23 M.J. 66 (C.M.A. 1986), it is by the Court this 13th day of January, 1987

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (PERSONS)
Appellate Government Counsel (MUSCHAMP)

APPENDIX B

No. 48,255.
NMCM 83 4044.

UNITED STATES,

Appellee,

v.

VAUGHN DESHA, Sergeant, U.S. Marine Corps,

Appellant.

U.S. Court of Military Appeals.

Nov. 10, 1986.

Accused, Sergeant, United States Marine Corps, pleaded guilty at a general court-martial to aggravated arson. The United States Navy-Marine Corps Court of Military Review affirmed findings of guilty and sentence. Review was granted. The United States Court of Military Appeals, Sullivan, J., held that: (1) accused could be convicted of aggravated arson for burning own residence, and (2) guilty plea was not improvident on basis that dwelling to which accused admitted setting fire was his own or on basis that dwelling was not inhabited.

Affirmed.

Everett, C.J., filed a concurring opinion.

For Appellant: *Lieutenant Timothy D. Persons,* JAGC, USNR (argued); *Captain David C. Larson,* JAGC, USN (on brief).

For Appellee: *Lieutenant Michael Mudgett,* JAGC, USNR (argued); *Captain W. J. Hughes,* USN, and *Captain David B. Stratton,* USMCR (on brief).

Opinion of the Court

SULLIVAN, Judge:

In accordance with his guilty pleas, appellant was convicted of aggravated arson, in violation of Article 126(a), Uniform Code of Military Justice, 10 U.S.C. § 926(a). The military judge, sitting alone at this general court-martial, sentenced him to a dishonorable discharge, confinement for 5 years, total forfeitures, and reduction to the lowest enlisted pay grade. The convening authority, in accordance with the pretrial agreement, approved this sentence. The Court of Military Review affirmed the findings of guilty and the sentence.

This Court granted review on the following issues:

I

WHETHER THE SPECIFICATION OF WHICH APPELLANT WAS CONVICTED FAILS TO STATE AN OFFENSE UNDER ARTICLE 126a, UCMJ, IN THAT APPELLANT IS ALLEGED TO HAVE SET FIRE TO HIS OWN DWELLING.

II

WHETHER APPELLANT'S PLEA OF GUILTY WAS IMPROVIDENT IN THAT THE DWELLING TO WHICH HE ADMITTED SETTING FIRE WAS HIS OWN.

After considering these issues, we affirm.

The facts of this case are not in dispute. Appellant owned and resided in a mobile home located in a trailer park on the grounds of the Marine base at Camp Lejeune, North Carolina. His wife and children had moved out of the dwelling a month earlier and resided in another state. There was a mortgage on this mobile home and a divorce action was expected.

Around 8:30 p.m. on March 8, 1983, appellant poured gasoline on the floor of the bedroom and a hallway of his trailer. At 2 o'clock in the morning on March 9, 1983, he set the trailer ablaze by tossing a roll of burning paper on the gasoline. He then fled from the trailer.

Neighbors reported the fire and the fire department responded. Other mobile homes were in the trailer park, some as close as 25 to 30 feet, and equipped with propone gas tanks. The fire department deployed against and extinguished the fire which caused significant damage to appellant's trailer but did not spread to his neighbors' trailers.

I

The first granted issue asks whether a servicemember may as a matter of law be convicted of aggravated arson under Article 126(a) for burning his own residence. At common law and under pre-code service definitions of this offense, a person could not be convicted of arson for burning his own home. It had to be the dwelling "of another." *See, e.g.,* R. Perkins, *Criminal Law* 226-28 and cases cited at 226 n. 98 (2d ed. 1969); para. 180*c*, *Manual for Courts-Martial,* U.S. Army, 1949; para. 180*c*, *Manual for Courts-Martial,* U.S. Air Force, 1949; section 124, *Naval Courts and Boards,* 1937.[1] Appellant argues that the legislative history of Article 126(a) and this Court's prior decisions

[1] The Supreme Court in *United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), stated that "authoritative administrative constructions should be given the deference to which they are entitled." *See 2A Sutherland Statutory Construction* § 49.03 (4th Ed. 1984). In this regard we note that since the enactment of the Uniform Code of Military Justice in 1950, all the editions of the Manual for Courts-Martial have consistently provided that a person may be convicted of arson under Article 126(a), UCMJ, 10 U.S.C. § 926(a), for setting fire to his own dwelling. *See* para. 205, *Manual for Courts-Martial, United States,* 1951; para. 205a, *Manual for Courts-Martial, United States,* 1969 (Revised Edition); and Part IV, para. 52*c* (2)(a), *Manual for Courts-Martial, United States,* 1984.

dictate the conclusion that this same limitation applies under Article 126(a). *See United States v. Acevedo-Velez*, 17 M.J. 1 (C.M.A. 1983); *United States v. Duke*, 16 U.S.C.M.A. 460, 37 C.M.R. 80 (1966). We disagree.

Turning first to the language of this criminal statute (*see United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), it is clear that this common-law limitation is not expressly stated in the statutory language and thus, the plain language of Article 126(a) allows prosecution for burning one's own home. The statute reads:

> § 926. Art. 126. Arson
>
> (a) Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

Moreover, one of the recognized ways of eliminating this common-law restriction was to simply remove the words "of another" from the proposed statute. *See Perkins, supra* at 227; A. Curtis, *A Treatise on The Law of Arson* § 43 at 52 (1936). Finally, the offense is characterized as "aggravated arson," which suggests that this offense is an enlargement upon or a more serious form of the traditional offense. *Perkins, supra* at 225.

We also note that Article 126(b) expressly uses these words of limitation with respect to the crime of simple arson. It states:

> (b) Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct.

In addition Article 129, UCMJ, 10 U.S.C. § 929, which proscribes burglary, a common-law offense also against the habitation, expressly retains the limitation to "the dwelling house of another." *See also* Article 130, UCMJ, 10 U.S.C. § 930. Clearly, Congress was aware of this limitation which existed at common law and was capable of expressing it in an unequivocable manner where applicable. *See* J. Snedecker, *Military Justice Under the Uniform Code* 881-82 (1953). *See generally Russell v. United States*, 471 U.S. _ , 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985); *United States v. Turkette, supra* 452 U.S. at 580-81 101 S.Ct. at 2527-28. Therefore, unquestionably the plain language of this statute and its codal context do not favor the position advanced by appellant.

Nevertheless, appellant contends that the legislative history of Article 126(a) evinces the clear intent of the drafters to codify the common law of arson. Consequently, he asserts that the omission of the words "of another" from this penal provision does not reflect an intent to expand the scope of this offense beyond its common-law limitation or at least is ambiguous in this regard. *See Curtis, supra*, and cases cited therein. Relying on the general principle of strict construction of penal statutes, he, therefore, asks this Court to find this limitation by implication and, accordingly, hold that his burning of his own home is outside the scope of this statute. We must reject such an argument.

In *United States v. Turkette, supra* at 580, 101 S.Ct. at 2527, the Supreme Court stated, "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)." As noted above, the words "an inhabited dwelling" in Article 126(a) are unambiguous at least in the sense that no restriction on ownership or occupancy is provided. Ac-

cordingly, before we can accept appellant's argument, a clearly expressed legislative intent to the contrary must appear.

The legislative history of Article 126(a) was noted in detail in *United States v. Acevedo-Velez* and *United States v. Duke*, both *supra*. This history is particularly silent with respect to an intention to continue the common law and prior military law which restricted the criminal act of arson to the dwelling of another (someone other than the perpetrator). Admittedly, the Morgan Committee, the Defense Department committee that was the primary drafter of the UCMJ legislation in 1948, generally characterized its proposal as "essentially common-law arson," a statement suggesting the above restriction was still applicable. However, the committee in the same sentence in its commentary also stated its proposal "is enlarged to cover structures other than dwellings, in view of the fact that the essence of the offense is danger to human life." Uniform Code of Military Justice: Hearings on H.R. 2498 before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. (hereinafter House Hearings) 1233 (1949). This recognition of the human hazard resulting from a fire transcends the common-law possessory concern with the security of the dwelling house and is consistent with the modern legislative trend in removing the requirement that the house burned be that of another. *See Perkins, supra* at 227. In any event, this apparent inconsistency in the legislative history falls far short of a clearly expressed intent which would justify our interpreting this penal statute contrary to its plain meaning. *See generally United States v. Turkette, supra.*

We recognize that section 124 of *Naval Courts and Boards, supra,* apparently construed a federal arson statute, 18 U.S.C. 464, to include this common-law exception even though the words "of another" were not included in that statute and the express language referred to "any dwelling house." We are also aware that the drafters of

Article 126 generally referred to this section of *Naval Courts and Boards* with respect to their proposed draft of this codal provision. However, no authority is cited in this service manual for its construction of that federal statute, and we have not been able to discover any on our own. *United States v. Cardish,* 145 F. 242, 246 (E.D.Wisc.1906), and *United States v. Cardish,* 143 F. 640, 642-43 (E.D.Wisc.1906), suggest a similar interpretation of the statutory predecessor of 18 U.S.C. § 464; however, this was dicta and proferred without explanation. A more recent federal case concerning 18 U.S.C. § 81, the statutory successor of both these federal statutes, suggests a contrary conclusion concerning federal practice. *See United States v. Gidden,* 679 F.2d 19 (4th Cir.), *cert. denied,* 459 U.S. 875, 103 S.Ct. 167, 74 L.Ed.2d 138 (1982). In such a context, we still perceive no clearly expressed legislative intent which contradicts the plain language.

Finally, the prior decisions of this Court[2] also do not support appellant's argument in this case. In *United States v. Acevedo-Velez,* and *United States v. Duke,* both *supra,* specific words in Article 126(a) were construed in accordance with their well recognized common-law meanings. Here, the common-law language "of another" was expressly omitted by Congress, and no clear basis exists in the Code (*United States v. Johnson,* 3 M.J. 361 (C.M.A. 1977) or the legislative history (*United States v. Buck,* 3 U.S.C.M.A. 341, 12 C.M.R. 97 (1953)) for finding such words by implication.

To summarize, appellant, with advice of counsel, pled guilty to setting fire to his own residence. The instant statute makes it a criminal offense of aggravated arson for anyone who willfully sets fire to "an inhabited dwelling." Notwithstanding the common-law restriction that it

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[2] Our decisions in *United States v. Caldwell,* 17 M.J. 8 (C.M.A. 1983), and *United States v. Fuller,* 9 U.S.C.M.A. 143, 25 C.M.R. 405 (1958), do not specifically address the granted issue in this case.

was not a felony to burn one's own dwelling, Congress made the burning "of an inhabited dwelling" (meaning *any inhabited dwelling*) a crime. Congress failed to include the common-law restriction in Article 126. The plain language of the statute makes appellant's act a crime. Therefore, appellant's conviction under Article 126 is correct in law and fact and must stand.

II

The second granted issue initially asked whether appellant's pleas of guilty were improvident because he admitted only that he burned his own residence. It is related to the first granted issue in the sense that appellant implied that such an admission was not legally sufficient to support his pleas of guilty to aggravated arson under his reading of Article 126(a). We have rejected appellant's construction of this statute and, accordingly, we conclude that his pleas were not improvident solely on the basis of his ownership or occupancy of the residence.

Expanding on this argument in his final brief, appellate defense counsel for the first time asserts that his pleas were improvident on a somewhat different basis. He notes that Article 126(a) requires that "an inhabited dwelling" be burned to constitute the crime of aggravated arson. He then argues that appellant's admissions during the providence inquiry and his statements during sentencing reflect the fact that this trailer was not actively occupied as a residence. Accordingly, he concludes that his pleas were improvident because it was not shown that he burned "an inhabited dwelling."

Prior to accepting appellant's pleas of guilty, the military judge explained to him the elements of the offense of aggravated arson under Article 126(a). In particular, he informed him, "Now, a house that has never been occupied or which has been temporarily abandoned is not an inhabited dwelling. In other words, you would have to be

living in that dwelling to constitute arson, inhabiting the dwelling. Do you understand that?" Moreover, in response to later questions from the judge, appellant admitted: (i) the trailer was his "residence"; (ii) he was "inhabiting" it as previously defined; (iii) he never "abandoned" it; and (iv) it was his "residence" when he poured the gasoline and later ignited it.

The military judge's explanation of the meaning of "an inhabited dwelling" for the purpose of Article 126(a) accorded with our decision in *United States v. Duke, supra* at 464, 37 C.M.R. at 84. *See Perkins, supra* at 202. The use of the structure as a place of habitation *at the time of ignition* is controlling. *Id.* Here appellant freely and intelligently admitted such a use and that he had not abandoned the trailer as a residence at the time he set the fire. It is true that appellant also stated that he wanted to "[g]et rid of it" or "burn it all the way to the ground." However, we are not persuaded at this late date that these statements implying an intent not to occupy the trailer in the future cast any doubt as to its character as a place of habitation at the time of the burning.

Moreover, in *United States v. Duke, supra,* this Court implied that the character of the structure as "an inhabited dwelling" was an objective fact unrelated to the mental condition of the arsonist. Of course in that case the arsonist was apparently not an occupant of the dormitory which was burned, while here the admitted arsonist was also the owner and, apparently, the sole occupant of the trailer. The latter's intention as the dweller may be relevant to the character of the structure at the time of ignition. *See Perkins, supra* at 202-03. However, such an intention is not sufficient to divest the structure of its character as "an inhabited dwelling," where there is no indication that the occupant actually moved out or vacated the dwelling at the time of the burning. *Id.* In sum, appellant's theory that he cannot be convicted of aggravated arson because he intended to abandon his admitted resi-

dence just prior to setting it on fire cannot be accepted by this Court. Under the circumstances of this case, appellant's burning trailer could reasonably be assumed to be "an inhabited dwelling" to the general public including the fire department personnel who may have risked their lives responding to and fighting the fire and any neighbor who might have attempted to search the burning home in a rescue attempt.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge COX concurs.

EVERETT, Chief Judge (concurring):

Under the common law, it was well established that arson required the burning of the dwelling of another. I am reluctant to conclude that a change has been made in a common-law crime without a clear indication that Congress so intended. *Cf. United States v. Acevedo-Velez,* 17 M.J. 1 (C.M.A. 1983). However—although here the expression of legislative intent is less clear than I would have preferred—Judge Sullivan's opinion has persuaded me that Article 126(a), Uniform Code of Military Justice, 10 U.S.C. § 926(a), has eliminated an element of the common-law crime of arson and that no longer is it necessary to establish that the burned dwelling belonged to someone other than the accused.

APPENDIX C

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
290 Stovall Street
ALEXANDRIA, VA 22332

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW
BEFORE

ALBER W. EOFF II | MICHAEL D. RAPP | A. F. MIELCZARSKI

UNITED STATES
v.

VAUGHN DESHA 499 62 9302, Sergeant (E-5),
U. S. Marine Corps

NMCM 83 4044 Decided 31 October 1983
Sentence adjudged 19 May 1983 Review pursuant to Article 66(c), UCMJ of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Lejeune, North Carolina 28542

CDR David C. Larson, JAGC, USN, Appellate Defense Counsel
LCDR Jeanne Carroll, JAGC, USN, Appellate Defense Counsel
LT Anita M. Fulton, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignment of error, and the Government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. We find the sentence appropriate for appellant's conviction of aggravated arson. Accordingly, the findings and sentence, as approved on review below, are affirmed.

/s/ ALBERT W. EOFF II
ALBERT W. EOFF II, Chief Judge

/s/ MICHAEL D. RAPP
MICHAEL D. RAPP, Judge

/s/ A. F. MIELCZARSKI
A. F. MIELCZARSKI, Judge